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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 299

STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY,

Appellants,

vs.

WARREN F. STERLING, RECEIVER FOR HAGERSTOWN BANK AND TRUST COMPANY, ETC.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF OF APPELLEE.

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Counsel for Appellee.

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF OF APPELLEE.

Statement of Facts.

The statement of facts contained in the brief of the appellants, pages 4-6, fairly presents an outline of the facts involved in this appeal, except as to the respective dates upon which the appellants acquired their stock.

The apellants in this case are F. Sydney Cushwa, Susan F. Cushwa, Nora Miller Baker, C. Walter Baker, Gladys K. Bostetter, Crystal Bostetter Hershey, Ardella M. Newcomer, Julia Hamilton Briscoe and Julia Hamilton Briscoe, Trustee.

These appellants first acquired stock in the corporation, now known as Hagerstown Bank and Trust Company, as follows:

	No. of Shares.	Date Acquired.
Sydney F. Cushwa	20	Jan. 3, 1929
Susan F. Cushwa	75	March 13, 1929
Nora Miller Baker	100½	Jan. 18, 1929
C. Walter Baker	19½	Jan. 18, 1929
Gladys K. Bostetter	27	Jan. 18, 1929
Crystal Bostetter Hershey	28½	Jan. 18, 1929
	½	Feb. 4, 1929
Ardella M. Newcomer	100	March , 1913
	33	Dec. 1, 1919
	33	Aug. 29, 1922
Julia Hamilton Briscoe	79½	Dec. 20, 1928
Julia Hamilton Briscoe, Trustee	2452½	Dec. 20, 1928

(R. 24.)

The earliest date on which any of the appellants acquired stock is March, 1913.

The statute in question, ch. 219 of the Acts of the General Assembly of Maryland of 1910, codified as Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland became effective on June 1, 1910.

None of the appellants were stockholders and there is nothing in the record to show that any of them were depositors or creditors until long after the statute complained of was enacted and became effective as part of the statutory laws of Maryland.

Reference to Official Opinion.

The decision from which this appeal is taken is officially reported in the case of *Ghingher* v. *Kausler*, 169 Md. 696 (*Hagerstown Bank and Trust Company* case), on the authority of *Ghingher* v. *Bachtell*, 169 Md. 678 (*Peoples Banking Company of Smithsburg, Md.*, case), for reasons set forth therein.

Attention is here called to an error in the printing of the official report in the case of *Ghingher* v. *Bachtell*, 169 Md. 678, occurring in the first sentence of the first paragraph on page 690. Through an error, the words "minimum" and "maximum" were transposed in the printing of the official report. The opinion is correctly set forth in the printed record in the *Peoples Banking Company of Smithsburg, Md.*, case in No. 298, October Term, 1936, of Supreme Court of the United States near the bottom of page 52 and is also correctly reported in 182 Atlantic Reporter, page 563.

A certificate for the purpose of pointing out this error was filed with the Clerk of the Supreme Court of the United States on November 14, 1936, executed by Herbert T. Tiffany, State Reporter of the Court of Appeals of Maryland, James A. Young, Clerk of the Court of Appeals of Maryland, and Carrol T. Bond, Chief Judge of the Court of Appeals of Maryland.

Summary of Argument.

I. THE APPELLANTS SEEK BY THIS APPEAL TO REVIEW THE CONSTRUCTION PLACED BY THE COURT OF APPEALS OF MARYLAND ON THE MARYLAND CONSTITUTION AND STATUTES RELATING TO LIABILITY OF STOCKHOLDERS OF BANKS AND TRUST COMPANIES, BUT FOR REASONS HEREAFTER ASSIGNED, THE DECISION OF THE APPELLATE COURT IN MARYLAND IS NOT THE PROPER SUBJECT OF REVIEW IN THIS CASE.

II. UNDER THE ADMITTED FACTS NO CONSTITUTIONAL QUESTION AS TO IMPAIRMENT OF CONTRACT IS PRESENTED ON BEHALF OF THE APPELLANTS.

A. The present corporation was not organized until June 1, 1908, when it began business as a bank and trust company.

B. When the first stock was issued and the first deposits made or debts incurred the statute law of Maryland since 1904 relating to corporations doing a trust business imposed upon its stockholders the identical obligations and gave to its creditors identical rights as the statute complained of.

C. Where banks in Maryland possessed both banking and trust powers, the Courts of Maryland uniformly applied the statutory liability applicable to trust companies.

D. None of the appellants in this case were either stockholders or creditors prior to the enactment of the statute complained of in 1910.

III. UNDER THE LAW THE APPELLANTS HAVE NO VESTED CONTRACTUAL RIGHTS AS STOCKHOLDERS WHICH WERE IMPAIRED BY THE STATUTE IN QUESTION.

A. None of the appellants acquired any stock in this corporation until long after the statute in question was enacted into law.

B. The charter of the corporation subjected its stockholders to such changes in statutory liability as might be made from time to time by the Laws of Maryland.

C. The provisions of Acts of 1870, ch. 206, Sec. 11 relating to banks by express terms provided for alteration of stockholders liability from time to time.

D. All charters of corporations in Maryland granted since Maryland Constitution of 1851 are subject to repeal and alteration.

E. Stockholders have no vested right to be proceeded against in any particular method or procedure.

F. By amendment to charter of corporation effecting reorganization in December, 1928, all stockholders became subject to 1910 liability statute.

IV. UNDER THE LAW THE APPELLANTS HAVE NO VESTED CONTRACTUAL RIGHTS AS CREDITORS WHICH WERE IMPAIRED BY THE STATUTE IN QUESTION.

A. So far as the record discloses none of the appellants became depositors or creditors of the corporation prior to the date the statute complained of took effect.

B. The legislation complained of was remedial in character and preserved all substantial rights of creditors.

C. The so-called incidents of contract set up by the appellants were merely matters of procedure under former fiction of contract prior to Maryland Statutes of 1904, 1908 and 1910.

D. The former remedy of creditors was inadequate and precarious.

E. No creditor has the right to complain of a change in the statute law modifying or taking away a right or remedy provided he be given in substitution therefor a right or remedy substantially equivalent thereto.

F. The remedy furnished to creditors under the present statute is more simple, direct and effective than under the preexisting law.

All statutes cited in this brief are Acts of the General Assembly of Maryland unless otherwise specifically designated.

ARGUMENT.

I.

The appellants seek by this appeal to review the construction by the Court of Appeals of Maryland of the Maryland Constitution provision relating to the liability of stockholders of banks and also the Maryland Statutes relating to the same.

CONSTRUCTION OF CONSTITUTION.

The provision in Section 39 of Article 3 of the Constitution of Maryland of 1867 reads as follows:

> "The General Assembly shall grant no charter for banking purposes nor renew any banking corporation now in existence, except upon the condition that the stockholders shall be liable to the amount of their respective share or shares of stock in such banking institution for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all banks shall be open to inspection under such regulations as may be prescribed by law."

Substantially the same provision was contained in the Maryland Constitutions of 1851 and 1864.

In the early cases decided in Maryland relating to the enforcement of the statutory liability of stockholders in manufacturing corporations and in banking corporations the Maryland Court of Appeals at no time and in no decision undertook to construe the meaning and effect of the constitutional provision. A careful reading of the opinion in each of these cases will show that the Court expressly limited its decision and interpretation to particular charters and statutes.

A brief summary of the decisions in Maryland and Maryland statutes will be found in France's Principles of Corporation Law, Section 122-124, page 235.

The first interpretation and construction of this constitutional provision appears in the language of the Court of Appeals of Maryland as follows:

> "We have before us not a simple Act of the Legislature, and as such, open to construction under the rules of statutory interpretation, but, in reality a basic provision of the State Constitution, as amplified in administrative detail by a subsequent act of the law making body of this State. The question, then, being one of constitutional and not statutory construction, and finding no case in which this section has been previously expounded, it is presented as one of first impression. Viewed in that aspect, the controlling force in its adjudication must be developed from an inquiry into the underlying purpose sought to be accomplished by its terms."
>
> "It will be observed, however, that the Constitution does not fix the maximum liability to which stockholders in a banking institution, organized under the authority thereof, may be subjected; it does, though, fix the minimum liability of such stockholder, which, under its mandate, shall be 'to the amount of their respective share or shares of stock in such banking institution, for all its debts and liabilities upon note, bill or otherwise.' Nor does it limit the liability of stockholders to such debts as may have been incurred by the bank during the respective period of stock ownership. It creates a liability, as an incident to stock ownership in a banking corporation, for all its debts; and it is nowhere apparent that it was the intention of the framers of the Constitution to place upon creditors of an insolvent bank, or upon a receiver of its affairs, the insurmountable burden of proving, from day to day, and perhaps over a long period of years, the exact financial status of a banking corporation as a condition precedent to the recovery of liability."
>
> *Ghingher* v. *Bachtell*, 169 Md. 678, 688, 690.

The constitutional provision prescribes no rule for the practical working out of its simple mandate; and by its

very silence leaves the question in Legislative control. It is true that early decisions of the Court of Appeals of Maryland construed language similar to that used in the Constitution as authorizing the remedial procedure formerly prevailing in Maryland, but no decision suggests that the creditors remedy thus supplied by the Court was the exclusive way of complying with the Constitution.

The constitutional provision does not of itself attempt to define the nature of the liability and does not provide any method for its enforcement. These matters were left to the Legislature of the State.

The courts of Maryland have construed this provision as establishing merely the minimum liability to be imposed upon stockholders of banks for the benefit of creditors.

Murphy v. *Wheatley*, 102 Md. 501, 514.

The Circuit Court for Washington County in originally passing upon the instant case stated "there is no prohibition in the Constitution against giving creditors of banks rights or imposing upon stockholders obligations greater than required by the Constitution". (R. 40.) The same view is expressed in the opinion of the Court of Appeals of Maryland in the instant case as quoted above.

The appellee contends that the statute under attack in this case imposes liability in strict accordance with the provisions of the Maryland Constitution to the effect that stockholders should be held liable at least to an amount equal to the par value of their shares for the debts and engagements of the bank. A reasonable and fair interpretation of the word "stockholders" as used in the constitutional provision and as used in the present statute points conclusively to those who were stockholders at the time the necessity for the enforcement of statutory liability arose to meet the debts and engagements of the bank.

CONSTRUCTION OF THE STATUTES.

The so called incidents of the contractual relation between stockholders and creditors of the bank under the older decisions in Maryland were not intended to define the nature of the liability of stockholders to creditors but arose only incidentally as the logical consequence of the Court attempting to furnish a procedure for the enforcement of liability. The change in the theory of recovery against stockholders giving the first legislative method of enforcement was made by Chapter 101 of the Acts of 1904, continued in Chapter 153 of the Acts of 1908 and copied in Chapter 219 of the Acts of 1910 which is the subject of the present litigation.

The Maryland authorities prior to the Act of 1904, Chapter 101, were decided upon the theory that there was no existing statute in Maryland prescribing the remedy or procedure for enforcing stockholders' liability.

In *Colton* v. *Mayer*, 90 Md. 711, at page 714 the Court says:

> "Some liability similar to this is generally fixed by statute upon the owner of stock in banking and other corporations that earn their profits out of the money of others; and it is sometimes provided, as in case of National banks for example, that in the event of failure the receiver can collect what is due on the statutory liability, but in the absence of some law giving him the right to do so, we cannot understand upon what principle he can maintain a suit on a statute such as we have before us."

The fair interpretation of these statutes from 1904 to 1910 inclusive is that they are purely remedial in character, that they are in strict accordance with the Constitution of Maryland, that they apply for the benefit of those creditors who were such at the time when the necessity of invoking the liability of stockholders arose and to those

stockholders who were such at the time it became necessary to call upon them to make their contribution toward the payment of the debts of the corporation.

Lange v. *Ghingher,* 168 Md. 353;
Robinson v. *Hospelhorn,* 169 Md. 117;
Ghingher v. *Bachtell,* 169 Md. 678.

A similar statute was construed by the Supreme Court of Michigan in 1899 for the purpose of determining what stockholders were meant and the same conclusion was reached upon the same reasoning used by the Maryland Court of Appeals in the instant case.

Foster v. *Broas,* 120 Mich. 1, 79 N. W. 696, 700.

This conclusion is further indicated by the interpretation placed upon the statute in question by the General Assembly of Maryland by the enactment of emergency banking legislation, by section 71M, of chapter 46 of the Acts of 1933 which says:

> "Nothing contained in this Act shall be construed to relieve any stockholder of record in any banking institution at the time of the passage of this Act from the liability imposed by Section 72 of this Article. Any person who may be a stockholder at the commencement of said period of custody and the subsequent transferee of record of said stock at the time the statutory liability for assessment shall become enforceable, shall be jointly and severally liable to the Receiver for the statutory assessment on said shares * * *."

Until the present litigation, there has been no decision of the Court of Appeals of Maryland construing the Statutes of 1904, 1908 and 1910 because until the instant case, the change in the procedure for the enforcement of stockholders liability was generally assumed by the Courts, lawyers and laymen in Maryland to apply only to stock-

holders of record at the time of the closing of a bank, and to be enforceable by a receiver for the benefit of creditors as in the case of National Banks.

In the earlier cases in Maryland the Court was construing statutes which were entirely different from the one we have now. Those decisions are, therefore, of no force as precedents in the instant case.

In the *Murphy* v. *Wheatley* case, 102 Md., *supra*, the Court says, bottom page 517:

> "But under the rule adopted by this Court, they can if they choose, ascertain who the stockholders are when the debts are contracted. As the late Legislature has changed the liability of stockholders of these companies by Act of 1904, the decision of the question may no longer be important as a precedent, but the rights of the parties to this suit are to be determined according to the existing laws of this State when that Act was passed."

To the same effect is *Coulbourn* v. *Boulton*, 100 Md. 350. The Court, on page 354, says:

> "It has been decided by this Court in the case of Murphy *vs.* Wheatley, *supra*, that the stockholders, of the corporation mentioned, and in which the Appellants are alleged to hold stock, are subject to the liability provided for in said Section 85L by virtue of its operative effect as a part of the general law relating to corporations. Before taking up the questions presented by the record it may be remarked that it will be seen from the dates given that the case is to be disposed of without reference to the Acts of 1904, Chapter 101 and Chapter 337."

The Court of Appeals in that case, as in the *Murphy* v. *Wheatley* case, *supra*, both of which cases related to the liability of stockholders of The City Trust and Banking Company of Baltimore City, was very careful to call atten-

tion to the fact that in deciding the case it was governed by the old Act of 1892 and was not governed by the Act of 1904, Chapter 101. The Court did not want its opinion in that case, as it did not want the opinion in the *Murphy* v. *Wheatley* case, to be considered in any manner as a precedent under the Act of 1904. The Act of 1904, Chapter 101, is substantially the same as the Act of 1908, Chapter 153 and as the Act of 1910, Chapter 219. The only change the Act of 1908 made in the Act of 1904 was to omit from the extra liability provision guaranty and fidelity companies, and the only change that the Act of 1910 made was to transfer trust companies from Article 23 (Corporations) and to include it with State banks in Section 72 of Article 11 (Banks) of the Annotated Code of Maryland.

It is respectfully submitted, however, for the reasons hereinafter set forth that no question of impairment of contract under the contract clause of the Federal Constitution is involved in this case and that the decision of the Court of Appeals of Maryland in the interpretation of the Maryland Constitution and the statutory liability statute in question is not open to review in this case.

II.

Under the admitted facts in this case no constitutional question as to impairment of contract is presented on behalf of either stockholders or creditors of the Hagerstown Bank and Trust Company.

A. THE CORPORATION WAS NOT ORGANIZED UNTIL JUNE 1, 1908, WHEN IT BEGAN BUSINESS AS A BANK AND TRUST COMPANY.

The present Hagerstown Bank and Trust Company was originally incorporated as a surety and guaranty company under the name of The Maryland Surety and Guaranty

Company by Chapter 298, Acts of the General Assembly of Maryland of 1902, page 416.

In 1904 there were several amendments to its charter, which for the purposes of this case, are inconsequential made by the Acts of 1904, Chapter 215, page 351, effective April 1, 1904. By Chapter 410 of the Acts of the General Assembly of Maryland of 1908, page 1285, its charter was further amended, changing its name to Maryland Surety and Trust Company, and granting the authority by Section 6 thereof to act as trustee and engage in a general trust business by which section it is also provided that "the liabilities of the stockholders shall at all times be determined by the laws of the State in force at the time the said liabilities may attach."

There was no further amendment to the charter until 1928, when, under the general provisions of the banking laws, there were certain amendments changing its name to The Hagerstown Bank and Trust Company, increasing the number of Directors, and increasing the capital stock from $250,000.00 to $550,000.00. See certified copy of amendment, Record page 27.

Although the corporation was originally incorporated in 1902, no stock was ever issued by it until June 1, 1908, and it did not open for the transaction of business until that date when it organized under the name of Maryland Surety and Trust Company as a trust company doing also a banking business. (Record page 23 and Appellant's Brief page 4.)

B. BEFORE THE CORPORATION ISSUED ANY STOCK AND OPENED ITS DOORS FOR THE TRANSACTION OF BUSINESS ON JUNE 1, 1908, THE GENERAL ASSEMBLY OF MARYLAND PASSED CHAPTER 153, ACTS 1908, PAGE 60, WHICH BECAME EFFECTIVE ON MARCH 30 OF THAT YEAR REPEALING AND REENACTING CHAPTER 101 OF THE

ACTS OF 1904 OF THE GENERAL ASSEMBLY OF MARYLAND, GOVERNING LIABILITY OF STOCKHOLDERS OF TRUST COMPANIES AS FOLLOWS:

85L. "The stockholders of every such safe deposit, trust and loan company or association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of every such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such stocks. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee shall not be personally subject to any liability on such stockholders, but the person pledging the stock and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be subject to the liability imposed upon the holders of said shares. And the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of such corporation, if necessary, to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction; provided that this Act shall not affect the rights or remedies of any creditor or depositor under the existing laws of this State against the stockholders of any such corporation, who were liable to any such creditor or depositor at the date of the passage of this Act; and provided further, that nothing in this Act shall be considered as a construction by the Legislature of the law hereby repealed."

This statute was codified as Section 116 of Article 23 entitled "Corporation" of the Annotated Code of Public General Laws of Maryland of 1910.

The above Act, which became effective on March 30, 1908, was, therefore, the law of the State of Maryland on June 1,

1908, when the first stock of the corporation was issued and when it began business as a bank and trust company. The liability imposed on stockholders by the Section just quoted is the same in every particular as Chapter 219 of the Acts of the General Assembly of Maryland of 1910 which is codified as Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland under which enforcement of the stockholders' liability in the instant case is sought. The only change in Chapter 219 of the Acts of 1910 was to transfer trust companies from Article 23 and to include them with State banks. Further, the Act of 1908, hereinbefore set forth, is in susbtance a reproduction of the Act of 1904, Chapter 101, page 179, which Act became effective on March 18 of that year. Therefore, the statute which is being invoked in this case was the law of Maryland since March 18, 1904, or more than four years before the present corporation issued any stock or opened its doors for the transaction of business.

All stock of The Hagerstown Bank and Trust Company, which operated as a trust company from the date of its organization in 1908 until its suspension, was acquired and all debts and deposits were made during the time these provisions as to stockholders' liability of trust companies remained unchanged upon the statute books of Maryland.

C. WHERE CORPORATIONS IN MARYLAND POSSESSED BOTH BANKING POWERS AND TRUST POWERS, THE COURTS OF MARYLAND HAVE UNIFORMLY APPLIED THE STATUTORY LIABILITY APPLICABLE TO TRUST COMPANIES SO LONG AS THERE WERE STATUTES IN EFFECT IMPOSING DIFFERENT LIABILITIES ON BANKS AND TRUST COMPANIES RESPECTIVELY.

At the time of the organization of this corporation on June 1, 1908, when the first stock was issued and the first debts incurred there were in Maryland two different stat-

utes relating to statutory liability of stockholders in such corporations:

(a) There was included in the provision of the General Laws of the State of Maryland in Article 11 entitled "Banks" Section 27 of the Code of Public General Laws of Maryland of 1888, the codification of Section 11 of Chapter 206 of the Acts of 1870 as follows:

> "The continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; and upon this further condition, that this Article and every part of it may be altered from time to time, or repealed by the Legislature."

(b) There was also in effect at that time Chapter 153 of the Acts of the General Assembly of Maryland of 1908 applicable to safe deposit, trust, and loan companies hereinabove set forth in full. In event the corporation then known as the Maryland Surety and Trust Company had become insolvent in 1909 the stockholders of said corporation would have been subjected to liability under the provision of Chapter 153 of the Acts of 1908.

This same situation arose in two different instances in Maryland.

It first arose in the cases of *Coulbourn* v. *Boulton*, 100 Md. 350, and *Murphy* v. *Wheatley*, 102 Md. 501 in respect to the liability of stockholders of the City Trust and Banking Company of Baltimore City which ceased to do business on June 6, 1903, when receivers were appointed. At the time of its failure there were likewise two statutes in

effect relating to statutory liability of its stockholders as follows:

(1) Chapter 206 of the Acts of 1870 relating to "Banks" as above set forth;

(2) Chapter 109 of the Acts of 1892 relating to safe deposit, trust, guaranty, loan and fidelity companies which Act provided:

> "Each stockholder shall be liable to the depositors and creditors of any such corporation for double the amount of stock at the par value held by such stockholder in such corporation."

The City Trust and Banking Company of Baltimore City operated both a banking and trust business as in the case of the Hagerstown Bank and Trust Company. The Court of Appeals of Maryland determined as a matter of law that its stockholders were subject to the provisions of the Acts of 1892 which imposed a statutory liability on stockholders of trust companies equal to twice the amount of the par value of the stock, commonly known as a triple liability.

The same situation arose again in the case of *Mister* v. *Thomas*, 122 Md. 445, in respect to the liability of stockholders of The Farmers Trust Banking and Deposit Company which ceased to do business on October 9, 1907, when receivers were appointed. At the time of its failure there were likewise two statutes in effect relating to statutory liability of its stockholders as follows:

(1) Chapter 206 of the Acts of 1870 relating to "Banks" as above set forth;

(2) Chapter 101 of the Acts of 1904 which was subsequently repealed and re-enacted by Chapter 153 of the Acts of 1908 quoted above, the only modification in the Acts of

1908 being to omit stockholders of guaranty and fidelity companies from the statutory liability.

The Farmers Trust Banking and Deposit Company operated both a banking and trust business as in the case of the Hagerstown Bank and Trust Company. The Court of Appeals of Maryland determined as a matter of law that its stockholders were subject to liability enforceable by its receiver under the provisions of Chapter 101 of the Acts of 1904 which imposed a liability identical in terms to the statute complained of in this case.

It is apparent therefore that even had the Hagerstown Bank and Trust Company failed before the passage of Chapter 219 of the Acts of 1910, complained of in this case, the same liability would have been imposed upon its stockholders for the benefit of its creditors as the liability which the receiver of the Hagerstown Bank and Trust Company is now undertaking to enforce.

Inasmuch as all stock in the corporation, known at the date of its organization as the Maryland Surety and Trust Company and now designated by appropriate amendments to its charter in 1928 as Hagerstown Bank and Trust Company, was issued subsequent to the passage of Section 153 of the Acts of 1908 imposing the identical liability complained of in this case and in the same language, we respectfully submit that its stockholders can not now come into Court and assert any violation of their vested rights or complain that any obligation of contract between them and the corporation or between them and the creditors of the corporation has been impaired.

D. NONE OF THE APPELLANTS IN THIS CASE WERE STOCKHOLDERS NOR DOES THE RECORD SHOW THAT ANY OF THEM WERE CREDITORS PRIOR TO THE ENACTMENT OF THE STATUTE COMPLAINED OF IN 1910.

As pointed out in the statement of facts, the earliest date that any of the appellants herein acquired any stock

in the corporation now known as the Hagerstown Bank and Trust Company was March, 1913, or almost three years after the statute complained of went into effect. And so far as the record discloses none of them were depositors or creditors prior to the respective dates they acquired their stock. With one single exception all of them acquired stock in the corporation after the charter of the corporation was amended on December 4, 1928, and its capital increased from $250,000.00 to $550,000.00 (R. 24, 27).

III.

The appellants have no vested contractual rights as stockholders under the law which were impaired by the statute in question.

A. NONE OF THE APPELLANTS ACQUIRED STOCK IN THIS CORPORATION PRIOR TO MARCH, 1913, OR APPROXIMATELY THREE YEARS AFTER CHAPTER 219 OF THE ACTS OF 1910 BECAME A LAW (R. 24).

Although two stockholders, to-wit, Annie E. Miller and John E. Stonebraker, Admr., who filed answers to the Receiver's petition in the Circuit Court below acquired stock prior to June 1, 1910, these stockholders did not participate in this appeal and their rights are not before this Court for adjudication.

There was only $150,000.00 authorized capital of the corporation issuable as of June 1, 1908 (Section 2, Corporate Charter, R. 28), and it does not appear that any of the stock held by the appellants was originally issued prior to the enactment of the statute complained of.

Stockholders of a corporation by the acquisition of stock became bound by the statute law of the State which was read into and became a part of the charter.

Kingston v. *Old National Bank of Centralia*, 359 Ill. 192, 194 N. E. 213.

B. By the express language of the charter of the corporation, its stockholders agreed to be bound from time to time by the laws of the State of Maryland in effect at the time the statutory liability should attach. Chapter 410 of Acts of General Assembly of Maryland of 1908.

C. The Acts of 1870 Chapter 206, Section 11, relating to "Banks" contained the express condition that the law as to stockholders' liability might be altered from time to time by the Maryland legislature.

D. The charters of all corporations in Maryland granted since the Maryland constitution of 1851 are subject to repeal and alteration.

Washington County Hospital v. *Mealey*, 121 Md. 274, 282.

Where the power to alter or amend a charter of a banking corporation is reserved to the Legislature, it may change the law in regard to the liability of stockholders without violating the Federal Constitution forbidding impairment of contracts. The Constitutional provision that "the Legislature shall grant no charter for banking purposes except upon condition that the stockholders shall be liable for the debts of the bank to the extent of their stock" does not preclude the Legislature from imposing a greater liability.

Pate v. *Bank of Newton*, 116 Miss. 666, 77 So. 601;
Parker v. *Carolina Savings Bank*, 53 S. C. 583, 31 S. E. 673;
Sherman v. *Smith*, 1 Black 587;
Duke v. *Force*, 120 Wash. 599, 208 Pac. 67;
Davis v. *Moore*, 130 Ark. 128, 197 S. W. 295;
3 Ruling Case Law, Section 26, p. 397.

E. STOCKHOLDERS HAVE NO VESTED RIGHT TO BE PROCEEDED AGAINST IN ANY PARTICULAR METHOD OR PROCEDURE TO ENFORCE THEIR STATUTORY LIABILITY.

Coffin Bros. v. *Bennett*, 277 U. S. 29, 48 S. Ct. 422;
Henley v. *Myers*, 215 U. S. 373, 30 S. Ct. 148;
Bernheimer v. *Converse*, 206 U. S. 576, 27 S. Ct. 755;
Fourth National Bank v. *Francklyn*, 120 U. S. 747, 7 S. Ct. 757;
Converse v. *Ayre*, 197 Mass. 443, 84 N. E. 98;
Harris v. *Taylor*, 148 Ga. 663, 98 S. E. 86;
Springhorn v. *Dirks*, 72 Mont. 121, 231 Pac. 912;
Cosmopolitan Trust Co. v. *Cohen*, 244 Mass. 128, 138 N. E. 711;
Allen v. *Prudential Trust Co.*, 242 Mass. 78, 136 N. E. 410.

F. BY AMENDMENT TO CHARTER OF CORPORATION EFFECTING REORGANIZATION IN DECEMBER, 1928, ALL STOCKHOLDERS BECAME SUBJECT TO 1910 LIABILITY STATUTE.

The charter of the corporation which until 1928 was known as the Maryland Surety and Trust Company was amended by Articles of Amendment dated December 4, 1928, and duly recorded in Liber 3, folio 379 of the Corporation Records of Washington County, Maryland (R. 27). By this Amendment the name of the corporation was changed from the Maryland Surety and Trust Company to Hagerstown Bank and Trust Company, the capital stock was increased from $250,000.00 to $550,000.00, the Board of Directors was increased and various other changes made in consequence of a reorganization by which the Hagerstown Bank and the Maryland Surety and Trust Company were consolidated. By this amendment of its charter the stockholders of the corporation subjected themselves to all the

provisions of Chapter 219 of the Acts of the General Assembly of Maryland of 1910 then in effect relating to the liability of stockholders of banks and trust companies.

Where a corporation subsequent to the passage of the statute imposing double liability in the State of Kentucky amended its charter with the consent of two-thirds of its stockholders by changing its corporate name and making other material alterations in its government, it was held by the Court that by so amending its charter the corporation became subject to the provisions of the statute passed subsequent to its incorporation and that therefore its stockholders were liable under the statute.

Senn v. *Levy*, 111 Ky. 318, 63 S. W. 776.

An acceptance of the altered charter was clearly made by continuation in business after the change was made. The statute in question is not void as infringing either upon the Constitution of the State or of the United States.

Blytheville v. *State*, 148 Ark. 504, 230 S. W. 550.

IV.

The appellants have no vested contractual rights as creditors under the law which were impaired by the statute in question.

A. As stated above there is nothing in the record to show that any one of the appellants were depositors or creditors of the corporation prior to June 1, 1910, when Section 68 of Chapter 219 of the Acts of the General Assembly of Maryland of 1910, codified as Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland (1924 edition) became effective.

B. The creditors of the Hagerstown Bank and Trust Company are being deprived of no substantial rights.

The Maryland statutes of 1904 Chapter 101, 1908 Chapter 153, and 1910 Chapter 219, relating to trust companies

and to banks were remedial in their nature. The substance of the obligation of the stockholder to the creditor was in the event of insolvency to pay a sum equal to the par value of his stock for the benefit of creditors.

C. THE SO CALLED INCIDENTS OF CONTRACT BETWEEN STOCKHOLDERS AND DEPOSITORS SET UP IN THE BRIEF OF THE APPELLANTS MERELY AROSE IN CONNECTION WITH THE PROCEDURE FURNISHED BY THE COURTS FOR THE ENFORCEMENT OF LIABILITY BEFORE ANY ACTUAL REMEDY WAS GIVEN BY STATUTE.

The Maryland courts treated the obligation as based on the fiction of a contract and applied the ordinary rules of pleading and procedure on that theory. There being no statute making the liability collectible by a receiver, courts in order to save the remedy as a matter of practice permitted the creditor to sue direct.

Colton v. *Mayer*, 90 Md. 711, p. 714.

Since the suit was based on a fiction of contract it became necessary under the common law rules of pleading and procedure for the creditor to show that the stockholder was a stockholder when he became a creditor with the ensuing result that the creditor was permitted to sue a stockholder for debts of the bank incurred while he was such even after the transfer of his stock. The right of set off was also allowed as a matter of procedure and pleading.

As stated so clearly by the Court of Appeals of Maryland in the instant case (*Ghingher* v. *Bachtell, supra*) the right of recovery down to 1904 so far as banks doing a trust business were concerned and down to 1910 so far as banks conducting solely and strictly a banking business were concerned was based upon the fiction of a contract and the enforcement of that liability by the Courts in order to give some remedy to creditors was based upon the fundamental principles involved generally in the enforcement of

contracts. Consequently when the creditor, who had no other means provided for him, undertook to collect from a stockholder the statutory liability of stockholders he was obliged to show as in other cases of contract, guaranty and suretyship that the stockholder whom he sued was a stockholder at the time his deposit was made or debt incurred. In the absence of any statute amplifying the constitutional provisions and providing means for its enforcement, the Courts of Maryland through a long series of cases proceeded upon the principle of this so called fictional contract in order to prevent a failure of the constitutional mandate. For this reason the many cases in Maryland cited by the appellants in their brief purporting to define the incidents of the liability of stockholders prior to 1904 have no application to the present case as stated by Chief Judge Boyd in the case of *Murphy* v. *Wheatley, supra,* in which on page 517 he says "As the Legislature has changed the liability of stockholders of these companies by the Act of 1904 the decision of the question may no longer be important as a precedent, but the rights of the parties to this suit are to be determined according to the existing laws of this State when that Act was passed".

D. THE REMEDY UNDER THESE OLDER DECISIONS DEALING WITH CASES PRIOR TO THE CHANGE OF PROCEDURE IN 1904 WAS A MOST UNCERTAIN AND PRECARIOUS ONE.

The theory of procedure invoked by the courts involved a race of diligence among creditors to sue individual stockholders, brought about a multiplicity of suits, made it possible for stockholders to prefer individual creditors, to make compromise settlements and to set off obligations to the disadvantage of other creditors, opened the way for collusion whereby a few inside creditors might exhaust the liability of the only solvent stockholders, permitted

friendly creditors to favor individual stockholders by release, waiver, etc.

There was no equality of remedy among creditors and no proportionate responsibility among stockholders. A stockholder could be sued up to the par value of his shares although the amount so recovered exceeded his share of the corporate deficit leaving him to sue his fellow stockholders for contribution.

This procedure was originally invoked in the cases of business and manufacturing corporations with few stockholders. When applied by analogy to banking corporations and trust companies what appeared to be a fair remedy became entirely illusory because of the practical impossibility with which creditors of large corporations were met in ascertaining what stockholders to sue.

For example in the instant case the Hagerstown Bank and Trust Company at the time of its closing had thousands of general creditors and about six hundred and fifty stockholders. The accounts of practically every customer were constantly changing and as a practical matter it would be impossible with constantly varying daily balances to determine the date or hundreds of dates when the liability due to any one particular depositor arose, and with the many transfers of stock in a bank of the size of the bank in question which had 55,000 shares of stock outstanding it would present to each of the thousands of depositors and creditors the difficult if not impossible task of determining who were the stockholders at the different times his particular deposits were made or debts accrued.

The underlying reason why the stockholders of the Hagerstown Bank and Trust Company are prosecuting this appeal is the hope that by obtaining an adjudication of Court sustaining their contention they will make it impossible for the creditors of the corporation to collect any part of the statutory liability. If they can have sustained

the contention which they are making, under the guise of protecting by legal sophistry a theoretical right of the creditors against stockholders, they will succeed as a practical matter in destroying the substantive right of creditors and depositors and thereby nullify the whole purpose of the constitutional and statutory provisions of the State of Maryland which were enacted for the purpose of furnishing creditors and depositors of banks and trust companies with the added asset of stockholders liability to the extent of the full par value of the shares of stock in the corporation, in this case amounting to $550,000.00.

This former remedial procedure in Maryland was characterized by the Maryland Court of Appeals in the case of *Pittsburgh Steel Company* v. *Baltimore Equitable Society,* 113 Md. 77, at page 82 in the following language:

> "The separate right of action at law existing in the creditors against the stockholder before the passage of the Act, although having had the appearance of a reliable and efficient remedy has been found upon close scrutiny, to have been in practice a precarious and uncertain one."

This case was reviewed by the Supreme Court of the United States in *Pittsburgh Steel Company* v. *Baltimore Equitable Society,* 226 U. S. 455, 33 S. Ct. 167, in which case the creditor's remedy against the stockholders under the former procedure is characterized as follows:

> "The plaintiff's supposed contract was subject to peculiar infirmities. His right was shared equally by all other creditors of the corporation, and not only might some other creditor by diligence have got in ahead of the plaintiff and have exhausted the fund for which the defendant could be held, but the right depended on the stockholder's will. As was observed by Judge Rose, following the Maryland cases, in Re-

public Iron & Steel Co. *vs.* Carlton, 189 Fed. 126, 137, the statute does no more than the stockholder was free to do before. He could have paid the corporation or a receiver or other creditors. The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plaintiff's right, but by considerations of fact,—of what the remedy amounted to in practice. It is admitted that bringing the action gave the plaintiff no lien, as it seems mistakenly to have been assumed to do in Myers *v.* Knickerbocker Trust Co., 1 L. R. A. (N. S.) 1171, 71 C. C. A. 199, 139 Fed. 111, 116. The Court of Appeals states that the remedy has been found in practice an uncertain one, less efficacious than that which is substituted. There is nothing to contradict their statement as to what experience has taught. With that fact before us and also the absolute dependence of the creditor upon the will of the stockholder, we can not go into nice speculation as to the probable result of this particular case, or say that the decision was wrong. The power of the state to make similar changes of remedy is asserted in more general terms than we have employed, in Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 755; 30 L. Ed. 825, 828; 7 Sup. Ct. Rep. 757. See also Henley *v.* Myers, 215 U. S. 373, 385; 54 L. Ed. 240, 246; 30 Sup. Ct. Rep. 148"

A return to the old method of procedure as stated by the Maryland Court of Appeals in the opinion filed in the instant case "would engulf all concerned in a swirling flood of litigation so lengthy, so tedious, and so costly that ultimately the inconclusive and discouraging nature of resort thereto would defeat the very end to be achieved by the basic law".

Ghingher v. *Bachtell*, 169 Md. 678, 693.

E. NO CREDITOR HAS THE RIGHT TO COMPLAIN OF A CHANGE IN THE STATUTE LAW MODIFYING OR TAKING AWAY A RIGHT OR REMEDY PROVIDED HE BE GIVEN IN SUBSTITUTION THEREFOR A RIGHT OR REMEDY SUBSTANTIALLY EQUIVALENT THERETO.

The creditor has no right to complain of a statutory change in the remedy for the enforcement of a contractual obligation, even to the extent of abolishing entirely the remedy in force at the time the contract was entered into, provided the method substituted therefor be substantially equivalent in coercive force to that provided by law when the obligation was contracted.

B. & O. R. R. Co. v. *Maughlin,* 153 Md. 367, p. 376-378.

Substitution of action by receiver to collect statutory liability in place of individual action by the creditor has been frequently upheld by the courts as a remedial measure.

Mister v. *Thomas,* 122 Md. 459;
Hughes v. *Hall,* 117 Md. 552;
Wheatley v. *Glover,* 125 Ga. 551, 54 S. E. 626;
Elson v. *Wright,* 134 Iowa 634, 112 N. W. 105;
Lynch v. *Jacobson,* 55 Utah 129, 184 Pac. 929;
Springhorn v. *Dirks,* 72 Mont. 121, 231 Pac. 912;
Lamar v. *Taylor,* 141 Ga. 227, 80 S. E. 1085.

It is within the power of the Legislature of a State to change the remedy of creditors against stockholders for collection of statutory liability provided an equally efficacious one is substituted.

Pittsburgh Steel Co. v. *Baltimore Equitable Society,* 226 U. S. 455, 33 S. Ct. 117.

F. THE REMEDY OF CREDITORS UNDER THE PRESENT STATUTE IS MORE EFFECTIVE AND PROTECTS THEIR RIGHTS MORE SUBSTANTIALLY THAN THE ONE UPON WHICH THEY WERE FORCED TO RELY PRIOR TO ITS ENACTMENT.

In order to remove the difficulties confronting creditors in large banks and trust companies operating in recent times, to prevent multiplicity of suits and to provide a simple, efficient and substantial remedy for the protection of creditors and depositors of such corporations, the language of the United States statute imposing liability upon stockholders of national banks was adopted by the General Assembly of Maryland in Chapter 101 of the Acts of 1904, Chapter 153 of the Acts of 1908 and Chapter 219 of the Acts of 1910.

> U. S. Revised Statutes Section 5151 (United States Code, Title 12, Section 63, Acts of Congress June 3, 1864, Ch. 106, paragraph 12).

The changed method of enforcement is based chiefly upon procedure. The remedy provided is simple, adequate, and efficacious. The ascertainment and collection of stockholders' liability under the new statute must be done by orderly process through the courts and by an impartial receiver under the Court's jurisdiction. The incidental loss of the right of set-off under the new procedure would work to the benefit of the creditor and not to his detriment.

Attention is called to the fact that of the present capital stock of the corporation amounting to an aggregate par value of $550,000.00, only $150,000.00 was originally issued upon the organization of the corporation (R. 28). The record shows that $300,000.00 of the capital stock was authorized by amendment and issued subsequent to December

4, 1928, and there is nothing in the record to show that the other $100,000.00 was issued prior to June 1, 1910, when Chapter 219 of the Acts of 1910 went into effect. All these stockholders as well as all depositors and creditors extending credit to the corporation had the right to regard the contract between themselves and the corporation as being determined by said last mentioned statute. Likewise all stockholders who subscribed for the original issue of stock when the corporation was organized on June 1, 1908, and all depositors and creditors doing business with the corporation after that date were entitled to regard their rights and liabilities as defined by Chapter 153 of the Acts of 1908 then in effect. There is no question as to the constitutionality of these statutes under the Maryland Constitution and until the instant cases the Maryland Court of Appeals has never been called upon to construe them. The contention of the appellants in this case, that the liability of these stockholders and the rights of these creditors should be determined by anachronistic theories of preexisting law, would, if sustained, be a substantial impairment of the contractual rights of both stockholders and creditors in violation of the contract clause of the Federal Constitution.

Conclusion.

For the reasons hereinabove set forth it is respectfully submitted that the appeal in the instant case should be dismissed and the decree of the Court of Appeals of Maryland appealed from should be affirmed with costs to the Appellee.

In the absence of counsel, the Appellee is willing to submit its cause on this brief.

Respectfully submitted,

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